A

CHAI CHIN FOO & ANOR

v.

ASSISTANT REGISTRAR, LAND & SURVEY DEPARTMENT, SAMARAHAN DIVISION & ANOR

B

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[ORIGINATING SUMMONS NO: 24-137-07-II]
14 AUGUST 2007

C

LAND LAW: *Caveat - Private caveat - Application to stay - Sarawak Land Code, s. 174 - Whether claim by plaintiffs fell under s. 173 of Sarawak Land Code - Whether an administratrix has legal right to transfer property - Whether such transfer invalid, null and void -* D *Indefeasibility doctrine - Whether second defendant could benefit - Whether there were bona fide merits in plaintiffs' application*

The plaintiff's originating summons sought an order that the caveat registered by the plaintiffs on the disputed property to remain in the land register until final order of the court or final E disposal of the suit thereto. The second defendant in opposing the application submitted that she was the administratrix of the estate of her late husband ('late husband') who was the registered co-proprietor of the property in dispute. The said parcels of land had been bought by the plaintiffs' father (now deceased) and at the F time of his death was the registered proprietor of the said parcels of land. By a memorandum of transfer, the plaintiffs' mother as representative of their late father had transferred the said parcels of land to the plaintiffs' brothers, namely Chai Koh Kip and Chai Choon Lian (now deceased). It was agreed that they were to be G the trustee of the said land and that at such appropriate time, the said parcels of land should be transferred in equal share to all the children. The second defendant was the wife of the plaintiffs' late brother, Chai Choon Lian who died interstate. As Chai Choon Lian was the plaintiffs' trustee in respect of their share in the said H parcels of land, the second defendant must transfer to the plaintiffs their share in the said parcels of land. Since the plaintiffs have beneficial and equitable interest in the said parcels of land, the plaintiff had lodged the aforesaid caveat on the said parcels of land. The burden was on the caveator to satisfy the court that I the caveat ought to stay. Under s. 174 of the Sarawak Land

Code (SLC), there were two requirements to be fulfilled: (a) statement of the nature of the estate or interest claimed; (b) statement of how the estate or interest claimed is derived from the registered proprietor. In crux, the second defendant argued (i) the plaintiffs have failed to prove that they have caveatable interest in the said land due to the defects in the application of caveat, uncertainty with regard to the nature of the estate or interest claimed; (ii) it was a bare allegation of trust; (iii) the second defendant's late husband acquired the title under s. 132 of the SLC, and thus had indefeasibility of title, (iv) there was no serious question to be tried and the balance of convenience required the said caveat to be removed.

Held (allowing plaintiffs' application):

(1) The property originally belonged to the father of the plaintiffs who had died interstate. As a matter of law, all issues were entitled to a share of the father's estate. Thus, the claim by the plaintiffs was one recognized in law and fell within the provision of s. 173 of SLC. The plaintiff's claim was not for the residue in the estate. (para 9)

(2) The deceased's estate was administered by the plaintiffs' mother. As an administratrix she had no legal right to transfer the said property to only two of the children excluding the plaintiffs. *Prima facie* such transfer was invalid, null and void and would be against the Probate and Administration Act to be read with Distribution Act 1958 as amended in 1997. (para 9)

(3) The second defendant was only an administratrix and not a purchaser for value; neither was the late husband to obtain the benefit of the indefeasibility doctrine. (para 9)

(4) There were *bona fide* merits in the plaintiffs' application. The plaintiffs were the beneficiaries of the legal estate of the deceased. (para 9)

Case(s) referred to:

Easow Plantations Sdn. Bhd. v. Mosbert Bhd & Another Case [1988] 1 CLJ 123; [1988] 1 CLJ (Rep) 47 SC ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***

Fung Yuk Lien v. Foong Chee Sam [2000] 6 CLJ 411 HC ***(refd)***

Goh Keng How v. Raja Zainal Abidin Raja Hussin & Anor [1996] 2 CLJ 353 HC ***(refd)***

A *Goh Paik Swan v. Ng Choo Lum [1997] 1 CLJ 77 CA* ***(refd)***
Hing Kim Pong v. Teo Eng Jin [1979] 1 LNS 28 FC ***(refd)***
Hj Yahya Yusoff & Anor v. Hassan Othman & Anor [1981] CLJ 127; [1981] CLJ (Rep) 152 HC ***(refd)***
Jit Kaur v. Parl Singh [1974] 1 LNS 57 HC ***(refd)***
B *Khoo Teng Seong v. Khoo Teng Peng [1990] 2 CLJ 233; [1990] 2 CLJ (Rep) 242 HC* ***(refd)***
Knight v. Knight [1840] 3 Beav 148 ***(refd)***
Law Pik Tai v. Wong Nyiik Foon [2002] 4 CLJ 486 HC ***(refd)***
Lee Ah Thaw & Anor v. Lee Chun Tek [1977] 1 LNS 52 FC ***(refd)***
Lee Phek Choo v. Ang Guan Yau & Anor [1975] 1 LNS 83 FC ***(refd)***
C *Lim Ah Moi v. AMS Periasamy Suppiah Pillay [1997] 3 CLJ 629 CA* ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 2 CLJ 713 CA ***(refd)***
Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor [1975] 1 LNS 93 HC ***(refd)***
D *Megapillars Sdn Bhd v. Loke Kwok Four [1996] 4 CLJ 82 HC* ***(refd)***
Mok Yong Kong & Anor v. Mok Yong Chuan [2002] 3 CLJ 615 CA ***(refd)***
Mosbert Berhad (in Liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC ***(refd)***
Murugappa Chettiar Lakshmanan v. Lee Teck Mook [1995] 1 CLJ 545 CA ***(refd)***
E *N Vangedaselam v. Mahadevan & Anor [1976] 1 LNS 80 FC* ***(refd)***
Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd [1998] 2 CLJ 909 CA ***(refd)***
Registrar of Titles, Johore v. Temenggong Securities Ltd [1976] 1 LNS 135 PC ***(refd)***
F *Tan Heng Poh v. Tan Boon Thong & Ors [1992] 3 CLJ 1340; [1992] 1 CLJ (Rep) 316 SC* ***(refd)***
Tan Kit Theng v. RHB Finance Bhd & Ors [1999] 1 LNS 142 HC ***(refd)***
Vijayalakshmi Devi Nadchatiram v. Danapakia Devi Nadchatiram & Anor [1998] 2 CLJ 832 CA ***(refd)***

G **Legislation referred to:**
Land Code (Sarawak), ss. 132, 173(a), 174(1), 177, 181

For the plaintiffs - Bernard Philip Lanat; M/s BP Lanat & Co
For the defendants - Wong Sing Nang; M/s Wong Orlando Chua & Kuok

H *Reported by Suhainah Wahiduddin*

I

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the plaintiffs' originating summons seeking an order that the caveat registered by the plaintiffs on the disputed property to remain in the Land Register until final order of the court or final disposal of the suit arising thereto.

[2] The plaintiffs in their affidavit, *inter alia*, say:

> 2. The said Parcels of Land were bought by our father (now deceased) CHAI CHAW @ TSAI CHAU who died interstate ... .
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> 3. At the time of his death, our said father was the registered proprietor of the said Parcels of Land.
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> 4. After the death of our said father, Letters of Administration was granted to our mother VOON MOI (now deceased).
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> 5. By virtue of the said Letters of Administration our mother applied ... for the said parcels of land to be transmitted to her.
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> 6. By a Memorandum of Transfer dated 23rd day of August, 1995 our said mother as representative of our said father who had died interstate, transferred the said parcels of land to our brothers namely CHAI KOH KIP and CHAI CHOON LIAN (now deceased) to hold in equal and undivided share of one half (1/2) each.
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> 7. When our mother transferred the said parcels of land to our said brothers CHAI KOH KIP and CHAI CHOON LIAN (now deceased) it was on the understanding that the transfer was subject to the beneficial interest of all the other children of our late father CHAI CHAW @ TSAI CHAU (now deceased). It was agreed that the said parcels of land shall be shared equally amongst the children of our said father.
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> 8. Furthermore, when the transfer was effected to our said brothers it was to enable them to secure a bank loan to develop the said parcels of land into fish farm.
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> 9. When the said parcels of land were transferred to our said brothers it was agreed that they were to be the trustee of the said land and that at such appropriate time, the said parcels of land should be transferred in equal share to all the children of our late father.

10. The 2nd Defendant is the wife of our late brother CHAI CHOON LIAN (now deceased) and she is the representative of our said brother who died interstate on 19th day of May, 2006.

11. As our late brother CHAI CHOON LIAN (now deceased) was our trustee in respect of our share in the said parcels of land, the 2nd Defendant must transfer to us our share in the said parcels of land.

12. Since we have the beneficial and equitable interest in the said parcels of land we had through our advocates Messrs B. P. Lanai & Co., Advocates lodged the aforesaid Caveat on the said parcels of land.

13. However on the 22nd day of February, 2007 our advocates was served with a notice under Section 178 of the Sarawak Land Code ... issued by the 1st Defendant herein stating that the said Caveat lodged on our behalf shall lapse in three months time unless an application is made to this Honourable Court for an Order to the contrary.

14. We also understand from the said notice that the 2nd Defendant has made an application to transfer the one half (1/2) share in the said parcels of land to herself.

15. We believe that the transfer of the whole of our late brother's one half (1/2) share in the said parcels of land should not be registered as the 2nd Defendant is merely a representative of our trustee.

16. As such we are making this application for an Order that the said Caveat shall not be removed and/or lapses and shall be allowed to remain on the Land Register until further order of the Court or after final disposal of the suit arising hereto.

17. We strongly believe that in the event that the said Caveat is removed or lapse and the said transfer from the 2nd Defendant is registered, the 2nd Defendant may deal with the undivided one half (1/2) share in the said parcels of land and prejudice our beneficial interest in the said parcel of land.

18. That we have given instruction to our advocates to commence civil suit to assert our rights in the said land.

19. In the circumstances, I humbly pray for an Order In Terms of my application herein.

[3] The 2nd defendant in opposing the application says that she is the administratrix of the estate of her late husband Chai Choon Lian (late husband) who is the registered co-proprietor of the property in dispute, and *inter alia*, asserts as follows:

> 4. As to paragraph 8 of Chai's Affidavit, I aver that the allegation that the transfer of the said Parcels of Land to my late husband was subjected to the beneficial interest of all the other children of my late father-in-law namely Chai Chaw @ Tsai Chau is a bare allegation and it is not true. My late husband, my late father-in-law and my late mother-in-law namely Voon Moi had never expressed in their lifetime that the said Parcels of Land are to be shared or shared equally between all the children of my late father-in-law. In fact, it was the express intention of my late mother-in-law when she transferred the half share of the said Parcels of Land to my late husband as evidenced by the Memorandum of Transfer dated 23.08.1995 which was exhibited as exhibit "CC-4" in Chai's Affidavit that my late husband was to receive the said Parcels of Land as beneficiary of the estate of my father-in-law and it was never intended that my late husband was to receive the same as trustee for his brother and sisters. There is no evidence that my late mother-in-law who acted as representative of my late father-in-law in transferring the said Parcels of Land to my late husband had agreed that the abovenamed Plaintiffs had a share in the said Parcels of Land. Furthermore, the Plaintiffs certainly did not disclose in their caveat that my late mother-in-law had agreed to that. I shall leave it to my counsel namely Mr. David Kuok of Messrs. Wong, Orlando Chua & Kuok Advocates to submit on the point of law during the hearing of this Originating Summons.

[4] The Sarawak Land Code (SLC) is based on Torrens System. (*See Hing Kim Pong v. Teo Eng Jin* [1979] 1 LNS 28). Even though the provisions relating to caveats cannot be said to be *pari materia* to the provisions in the National Land Code 1965 (NLC), the principles set out in those cases will almost always apply to SLC. The principles whether or not to sustain the lodgment of a caveat and in what circumstances an allegation of trust can be sustained has been set out in a number of cases.

In this case, the said caveat was lodged by the plaintiffs, pursuant to s. 173 of the SLC. That section provides:

A Any person:

(a) claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Code by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied or otherwise howsoever;

B

[(b) and (c) not relevant]

may at any time lodge with the Registrar of caveat in Form O in the First Schedule.

C For the plaintiffs to be able to maintain the said caveat, the plaintiffs must first satisfy the court that they have a caveatable interest in the said land. To have a caveatable interest the plaintiffs must come within the category of person in s. 173(a) of the SLC as mentioned above. The statutory declaration of the D plaintiffs annexed to the caveat instrument read as follows:

3) When our said father died interstate his estate was transmitted to our mother VOON MOI (now deceased) and subsequently transferred to our brothers CHAI KOH KIP (BIC K.215083 now replaced by WN KP. No. 510101-13-5917) and CHAI CHOON E LIAN (BIC K.585188 (now deceased) as trustee on behalf of and for the benefit of all the children of our late father.

4) We fear that the Administrator of the estate of CHAI CHOON LIAN (now deceased) who died interstate may transfer and/or deal with the undivided one half (1/2) share in the said parcels of F land and prejudice our right as beneficial co-owners thereof.

5) The purpose of us making this Statutory Declaration is so that that we may caveat the one half (1/2) share of the abovesaid parcels of land now registered under the name of our late brother G CHAI CHOON LIAN (now deceased).

From paras 3, 4 and 5 of the statutory declaration, it is clear that the plaintiffs are claiming the right to caveat the land because the late husband stood as a trustee on behalf of and for the benefit H of all the children of the deceased. Under s. 173(a) of the SLC, any person claiming to be entitled to or to be beneficially interested in any land, estate or interest under the SLC by virtue of any unregistered agreement or other instrument or transmission, or of any trust express or implied or otherwise howsoever may at I any time lodge with registrar of caveat in Form Q in the first schedule. Section 174(1) of the SLC reads as follows:

> Every caveat shall be signed by the caveator, or by his attorney or agent, and shall state with sufficient certainty the nature of the estate or interest claimed by the caveator and how it is derived from the proprietor. It shall also appoint a place, or give an address, within Sarawak at or to which notices and proceedings relating to the caveat may be served or addressed.

Under s. 174 of the SLC a caveator "shall state with sufficient certainty the nature of the estate or interest claimed by the caveator and how it is derived from the proprietor." In the caveat instrument the claim to enter the caveat is as follows:

> TAKE NOTICE that we, CHAI CHIN FOO (Chinese) (BIC K.215768 now replaced by WN KP. NO.490621-13-5288) OF Kolong 8, Jalan Matang, 93050 Kuching, Sarawak and CHAI SHIN HIONG (Chinese) (BIC K. 215770 now replaced by WN KP. NO. 540407-13-5423) of No. 31, Jalan Upper Chawan, 93300 Kuching, Sarawak claiming to be entitled to or to be beneficially interested in all that parcel of land situated at 32nd Mile Simanggang Road, Serian containing an area of 4.804 hectares and 2.633 hectares, more or less and described as Kuching Occupation Ticket No. 10616 and Kuching Occupation Ticket No. 10566 respectively (hereinafter referred to as "the said Parcels of Land") as the sisters and beneficial co-owners of the registered proprietor CHAI CHOON LIAN (now deceased) by virtue of Statutory Declaration declared on 17th day of August, 2006 a copy of which is annexed herewith and marked "X". DO HEREBY FORBID the registration of any transfer of and any other dealing affecting the undivided share of one half (1/2) in the said Parcels of Land until this caveat is withdrawn by us or is otherwise rescinded and lapses in accordance with the provision of the Land Code (Sarawak Cap. 81).

Paragraphs 7 and 8 of the 2nd defendant's affidavit in opposition (I) states that:

> I verily believe that the Caveat lodged by the abovenamed Plaintiffs dated 17.08.2006 and marked as exhibit "CC-1" in Chai's Affidavit is defective and bad in law as it did not state with sufficient certainty the nature of the interest claimed and how it derived from my late husband or my late father-in-law. It did not disclose in what way my late husband was said to be the trustee in their caveat.

> that I verily believe that the Caveat lodged by the abovenamed Plaintiffs dated 17.08.2006 is defective as it did not expressly specify that the Caveat was intended to bind their limited interest in the said Parcels of Land and in fact, the size of the residuary estate of my late father-in-law for distribution has not been ascertained and whatsoever the purported interest the Plaintiffs are trying to claim in the said Parcels of Land is a contingent right in future and is not capable of supporting a caveatable interest in the said Parcels of Land.

The 2nd defendant alleges that the plaintiffs did not confine the caveat to protect their limited right in the said land, ie, they caveated the deceased's whole lands and did not specify in the caveat instruments that the effect of the caveat is expressed to effect only that part of land that they are allegedly interested in, and under s. 174(1) it is for the caveator to state with sufficient certainty the nature of the estate claimed.

Further, the 2nd defendant alleges that the plaintiffs did not explain in the caveat instruments how the interest is derived from the deceased brother, bearing in mind that the 2nd defendant is challenging the existence or creation of alleged trust and the three uncertainties.

The principles whether or not to sustain the lodgment of a caveat and in what circumstances an allegation of trust can be sustained has been set out in a number of cases. In *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor* [1995] 2 CLJ 713; [1995] 3 CLJ 520 Gopal Sri Ram JCA propounded a three stage approach. The learned judge of the Court of Appeal opined:

> (i) The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then *cadit quaestio*, and the caveat must be removed without the necessity of going any further.
>
> (ii) The matter does not come to an end once the caveator satisfies the court that his claim as expressed in the application in Form 19B amounts in law to a caveatable interest. He must go on to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second stage. The degree of proof that has to be offered will, of course, vary from case to case.

> At this second stage the court is more concerned with matters of evidence and proof offered to support caveator's claim. ... Although a caveator may, in his application for the entry of a caveat, show a *prima facie* caveatable interest in the property in question, he may fail to adduce satisfactory evidence at the hearing of the application for its removal so that the judge would be entitled to hold that the claim in support of the caveat has not been made out and that there is therefore no serious question to be tried.
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> (iii) "The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong & Ors v. V Lectumanan* [1979] 2 MLJ 212 (Privy Council) as 'the balance of convenience'.

The burden is on the caveator to satisfy the court that the caveat ought to stay. Under s. 174 of the SLC, there are two requirements to be fulfilled:

(a) statement of the nature of the estate or interest claimed. A caveat must show what estate or interest the caveator claims.

(b) and statement of how the estate or interest claimed is derived from the registered proprietor.

In *Luggage Distributor's (supra)*, it was stated that at the first stage of enquiry, the court is to examine the grounds expressed in the application for the caveat to see whether they show a caveatable interest. In *Law Pik Tai v. Wong Nyiik Foon* [2002] 4 CLJ 486, Clement Skinner J had this to say:

> With that I turn to consider each of the three stages of curial scrutiny which the defendant must satisfy before her caveat can be allowed to remain on the register. I begin first by examining the grounds expressed in the defendant's application for the caveat to determine whether they disclose a caveatable interest.

Further on, His Lordship continued:

> It will be apparent from what I have said so far that in this first stage, my examination of the grounds relied on by the defendant to sustain her caveat are confined to the grounds expressed in her caveat and statutory declaration.

Also in *Mosbert Berhad (in Liquidation) v. Stella D'Cruz* [1985] 1 LNS 47 Seah FCJ said in determining caveatable interest the court "should confine itself to caveat and other supporting documents". In *Goh Paik Swan v. Ng Choo Lum* [1997] 1 CLJ 77 the application for lodgment relied on an option to purchase. However, there was no sale and purchase agreement either negotiated or executed by the parties. In the affidavit filed to oppose an application for removal of caveat, the caveator alleged that the document concerned was an agreement made. The High Court allowed the caveat to remain. The Court of Appeal in allowing the appeal by the caveatee held that because the basis of the caveator's claim to the interest in land stated the caveat rested on an option, it was for him to satisfy the court that he had exercised the option in the manner prescribed therein, or that had been prevented by the caveatee from doing so. Gopal Sri Ram JCA opined:

> The learned judge also overlooked the inconsistent stand taken by the respondent when he came to resist the application to remove the caveat. In his affidavit filed in opposition to the appellant's motion, the respondent said that the document of May 4, 1995 was an agreement made between himself and the appellant.
>
> Meaning no disrespect to the learned judge, it would appear that he did not sufficiently address his mind to the facts that were presented to him. The respondent had, in his application in Form 19B for the entry of the caveat, described the document of May 4, 1995 as an option and not as an agreement. Having entered the caveat on that footing he was, if he desired this restraint to remain upon the register, obliged to sustain its existence upon the grounds stated by him in his aforesaid application. It would be wholly wrong to ignore, as the learned judge did, a solemn claim made in a form prescribed by Parliament for purposes of imposing a serious restraint upon the exercise by a registered proprietor of his rights over his immovable property.
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> The ground expressed in the application for the caveat in our present case is insufficient to establish a "TRUST".

(b) In crux, the 2nd defendant argues (i) the plaintiffs have failed to prove that they have caveatable interest in the said land due to the defects in the application of caveat, uncertainty with regard to the nature of the estate or interest claimed. (ii) it is a bare allegation of trust. (iii) the 2nd defendant's late husband acquired the title under s. 132 of the SLC, and thus

had indefeasibility of title. (iv) there is no serious question to be tried and the balance of convenience requires the said caveat to be removed. In this case the plaintiffs are alleging a trust and relying heavily on a number of cases and submit as follows:

(i) it is trite law, as spelt in Lord Langdale's judgment in *Knight v. Knight* [1840] 3 Beav 148, that in order for a trust to be valid the 'three certainties' must be present – certainty of words, certainty of subject, and certainty of object. In this case, it is not in dispute that the 2nd defendant's late husband was the registered proprietor of the said land. The said land was transferred to the 2nd defendant's late husband.

(ii) in *Lee Phek Choo v. Ang Guan Yau & Anor* [1975] 1 LNS 83 the Federal Court held that there must be some writing to manifest a declaration of trust as the Statute of Frauds is applicable to Sarawak. The fact of the case is as follows:

> One Teo Kim Tee (f) owned some landed properties and before her death she transferred the properties to the appellant, her daughter-in-law. The documents of transfer were duly registered. The respondents alleged that the deceased had intended that the properties were to be held on trust "to be divided amongst her grandchildren after her death." There was no writing to indicate any declaration of trust. The trial judge held that there was a trust of the properties. The appellant appealed.
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> Held, allowing the appeal: as the Statute of Frauds applied to Sarawak, and as there was no writing to manifest the declaration of trust, it could not be that a trust was created in respect of the properties.

Lee Hun Hoe (CJ) Borneo opined in regard to create a trust:

> In creating a trust, as laid down by Lord Langdale – MR in *Knight v. Knight* [1840] 3 Beav 148 at p 173 there must exist the three certainties, that is, certainty of words, certainty of subject-matter and certainty of objects. *Snell's Principles of Equity*, 26th edn, discusses about the effect of absence of the certainties at pp. 126 to 127 as follows.

A The paramount certainty is that of subject-matter in the first sense; if there is no certainty as to the property to be held upon trust, the entire transaction is nugatory. Next, if that certainty is present but there is no certainty of words, the person entitled to the trust property holds free from any
B trust. Finally, if both these certainties are present but there is uncertainty of objects, there is a resulting trust for the settle, for 'once establish that a trust (of definite property) was intended and the legatee cannot take beneficially', the same applies where is uncertainty of the subject matter as regards the beneficial interest, unless one of the beneficiaries
C can establish a claim to the whole.

Halsbury's laws of England, 3 Ed, Vol 38 at p. 830 para 1388 states that:

A declaration of trust respecting any land or any interest
D therein must be manifest and proved by some writing signed by some person who is able to declare the trust or by his will.

This is based on the Statute of Frauds which is a statute of general application and is applicable in Sarawak by virtue
E of s 2 of the Application of Laws Ordinance (Cap 2) which reads as follows:

2. Subject to the provisions of this Ordinance and save in so far as other provision has been or may hereafter
F be made by any written law in force in Sarawak, the common law of England and the doctrines of equity, together with statute of general application, as administered or in force in England at the commencement of this Ordinance, shall be in force in Sarawak:

G Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Sarawak so far only as the circumstances of Sarawak and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary.

H That this is the position is indicated in *Chin Yuk Kon v. Chop Koong Onn* [1949] SCR 19 at p 20 by Lascelles J when he said:

This is an alleged contract of guarantee and the position
I is governed by the provisions of the Statute of Frauds.

…

> I am satisfied that there is in the sphere of guarantee an accepted and general usage, uniform and universal in Sarawak among Chinese. I have come to the conclusion that I must recognize such custom to the extent than it enables me to hold the 'chopped' bill to constitute sufficient memorandum to satisfy the provisions of the Statute of Frauds.
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> In this case there is no writing at all to indicate any declaration of trust. The only documents are memorandum of transfer, but they in no way indicate any such declaration.

Further on, Ong Hock Sim FJ said:

> Expressions of intention are not enough. Equity will not perfect an imperfect trust. Is a trust established? Hearsay and oral evidence is all that was before the court. The Statute of Frauds applies to Sarawak (see *Chin Yuk Hon v. Chop Koong Oon* [1949] SCR 19 at p 20 per Lascelles J).
>
> As is said in *Halsbury's Law of England* (3rd Ed), vol 38, para 1388 at pp. 830:
>
> > A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare the trust or by his Will.
>
> I accordingly am of the opinion that the respondents had failed to prove the existence of a trust would dismiss the claim with costs here and the court below. The deposit will be refunded to the appellant.

There is no evidence produced by the plaintiffs to show a declaration of trust either by the late Chia Choon Lian or their late father. There is no evidence to show that the late Chia Choon Lian was holding the said land on trust for the plaintiffs.

(iii) further, in *Law Pik Tai (supra)* under s. 177 of the SLC the plaintiff applied to for the removal of a caveat lodged by his wife, the defendant, against four parcels of land ('the said lands'). The defendant asserted her rights over the said property by alleging that they were matrimonial assets and claimed, *inter alia*, that the plaintiff had planned to dispose of the said lands without her knowledge or consent. The plaintiff

A denied that the said lands constituted matrimonial assets and submitted that he had acquired the said lands from his own resources for, property development purposes. The High Court held:

> B The Defendant's statutory declaration did not indicate that she had contributed or laid out any sums of money in the purchase of the said lands, or set out the facts or any other circumstances which gave rise to some kind of trust expressed or which could be implied by law which would create or tend to create some kind of "interest" in the said C property.

(iv) a caveat can be removed on technical grounds, if it fails to comply with the requirements of s. 174 SLC which has been characterised as "mandatory". In *Fung Yuk Lien v. Foong Chee* D *Sam* [2000] 6 CLJ 411. Tee Ah Sing J observed:

> The plaintiff lodged a caveat against a piece of land under s. 173 of the Land Code (Cap 81). In her statutory declaration, the plaintiff stated that she was claiming the right to caveat the land because the land was transferred to E her mother on the understanding that the land shall revert to her and her sister if their mother shall predecease them. When the statutory declaration was sworn by the plaintiff, her sister had already passed away. The plaintiff did not state in the statutory declaration that she was also F representing the estate of her deceased sister to lodge the caveat. It was also not stated that the claim to the land was on behalf of herself and the estate of her deceased sister. The plaintiff filed an application that the caveat shall not lapse and be removed and be allowed to remain on the land register until trial or further order. The issues before the G court were whether: (i) the affidavits were defective due to improper jurat and without the word 'solemnly'; (ii) the plaintiff had a caveatable interest in the land; and (iii) the caveat was void.

The court held that: H

> Under s. 174 of the Land Code, a person who claims an interest in a specific portion of land may caveat the whole land provided that the effect of the caveat is to cover the particular interest claimed. In the present case, the plaintiff I caveated the whole of the land without expressly stating that it was to protect her limited interest in the land only.

The caveat contained a serious defect in failing to comply with the mandatory requirement of s. 174(1) of the Land Code. Therefore the plaintiff's entry of the caveat against the whole of the land was null and void and of no effect and the court had no power to allow a defective or invalid caveat to be amended. Therefore, the court ordered that the caveat lodged by the plaintiff be removed from the register (see pp 553G-I, 554B).

(v) in *Fung Yuk Lien (supra)*, Tee Ah Sing J held that s. 174(1) SLC was a mandatory provision and held that the caveat was bad and should be removed because the caveator had caveated the whole land when her interest was only in a portion of it. His Lordship was of the view that the court had no power under s. 181 SLC to amend the caveat.

Under s. 177 the court is only given discretion whether to order the caveat to be removed or not. It does not give discretion to the court to order that a defective or invalid caveat to be amended by the caveator or by the court.

(vi) in *Tan Heng Poh v. Tan Boon Thong & Ors* [1992] 3 CLJ 1340; [1992] 1 CLJ (Rep) 316, the court observed:

Mr. Tan Kee died on 23 January 1969. By his last will the deceased left all his properties to his six sons in equal shares. Grant of probate was granted on 14 April 1971. The appellant (the caveator) was one of the brothers and was beneficially entitled to 1/6 share in the properties.

On 21 July 1989 the appellant and another brother commenced proceedings against other beneficiaries. The cause of action was for breach of a family arrangement entered by all the six beneficiaries on or about 1974.

Pending the outcome of the civil suit on the "family arrangement "dispute, the caveator entered a caveat under s. 323 National Land Code (NLC) on all the 8 parcels of land on the basis that he was beneficially entitled to the properties under the deceased estate.

The Supreme Court held that the Form 19B read with the statutory declaration showed that whilst the appellant did sufficiently particularise the nature of his claim on which his application was based, he ought to have expressly specified that the caveat was intended to bind his limited interest in the 8 parcels of land and not the whole land. The caveat contained a serious defect in failing to comply with the

A requirement of s. 323(2) NLC. There is clear distinction between the effect of a caveat expressed to bind the land itself under s. 323(2) NLC and one to bind a particular interest only under s. 323(3) NLC.

B The Court ordered the caveat to be removed. See also *Yeap Joo Kim v. Ong Choo Ean* [2000] 1 CLJ 333.

[5] The 2nd defendant alleges that in the statutory declaration annexed to the caveat as exh. "X", the plaintiffs just stated "as trustees on behalf of all the children of our late father." It did not C disclose how they derived from the deceased brother or late father the alleged nature of estate or interest. There is a "missing link" ie, how it is derived "from the proprietor" and relies on the case of *Easow Plantations Sdn. Bhd. v. Mosbert Bhd & Another Case* [1988] 1 CLJ 123; [1988] 1 CLJ (Rep) 47 where Mosbert Bhd D the original owner of certain land in Plentong, Johore Bahru comprising 113 acres 2 roots and 20 points which it subdivided into lots of 6,000 square feet each and sold them off to various purchasers. Mosbert then went into liquidation and the liquidator sold the land to Jet Age which applied for the removal of the E caveats. Two caveats, the Easow's and Ranjit's caveats were removed by Shankar J and Yussof J respectively. The Supreme Court allowed Ranjit's appeal because his caveat was correctly expressed to affect only the lot he purchased from Mosbert. Easow's caveat though correctly expressed as regard to the lot F affected had a "missing link" in that it did not show how it was derived from Mosbert. It claimed that it acquired the 26 lots by way of assignment from Module Construction Sdn Bhd but failed to show how this company had obtained its interest. The court said "There is simply no connection between Module Construction G and the purchaser or Mosbert Berhad. Since the land is vested in Mosbert Berhad, this missing link, in our view, does not satisfy the requirement of s. 323 subsection (2)". In *Mok Yong Kong & Anor v. Mok Yong Chuan* [2002] 3 CLJ 615 the fact laid before the court is as follows:

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> The land caveated was transferred by its original owner to his brother to enable him to raise funds. In breach of their agreement or understanding to retransfer the land it was transferred instead to another. The caveat lodged after this was removed as "frivolous and vexatious" by the Court of Appeal because the I caveator did not make any allegation or claim against the then registered owner. The caveator was restricted to the grounds

stated in his caveat application. The appellate court stressed that the exercise of the judge's discretion whether to remove the caveat or not would not be interfered with unless injustice had occurred. This would be the case if he had taken into account irrelevant considerations or failed to take into account relevant considerations or had asked himself the wrong question or misdirected himself on the correct principles of law applicable.

Gopal Sri Ram said:

The judgments of this court in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520, *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 2 CLJ 545, and *Goh Paik Swan v. Ng Choo Lum* [1997] 1 CLJ 77 sufficiently establish the proposition that a caveator must be held to the grounds he alleges in his application in form 19B when lodging his caveat. Were it otherwise, the policy of the legislature in enacting s. 323 of the NLC will be defeated. Caveators could then enter caveats on entirely frivolous and vexatious grounds and then purport to sustain such caveats on other grounds when the hapless landowner attempts to remove them. That cannot be the law. That is not the law.

From the authorities citied above, the 2nd defendant alleges that the plaintiffs have failed to satisfy and fulfill s. 174 of the SLC, therefore the caveat should be ordered to be removed.

[6] Further the 2nd defendant says that when the said land was registered in the name of their late brother, in 23 August 1995, the 2nd defendant's husband acquired indefeasibility of title in the said land. The 2nd defendant relies on the case of *Hing Kim Pong v. Teo Eng Jin* [1979] 1 LNS 28 where Lee Hun Hoe CJ had this to say regarding indefeasibility of title as to s. 132 of the SLC:-

One of the principal objects of the Torrens system of land registration and conveyancing is to ensure certainty of title and registrable interests in land. The Sarawak Land Code is based on the Torrens system. Section 132 protects the title of a registered proprietor by making it indefeasible except in cases of fraud, forgery or illegality.

[7] Finally the 2nd defendant alleges that there is substantial delay in the plaintiffs from prosecuting their claim and relies on the case of *Tan Kit Theng v. RHB Finance Bhd & Ors* [1999] 1 LNS 142. In this case, the caveat was lodged on 23 August 2006. The originating summons for stay of caveat was filed on 25 April 2007.

A The writ of summon was filed only on 6 June 2007, after affidavit in opposition was filed by the 2nd defendant. In *Megapillars Sdn Bhd v. Loke Kwok Four* [1996] 4 CLJ 82 the court refused to extend the caveat even though it was of the view that there was caveatable interest because of the inordinate delay by the caveator B in taking his legal action. The legal action was only filed one month after the application for extension of caveat was filed.

[8] I have read the originating summons and the affidavits and submissions filed by the parties. The law and jurisprudence relating C to caveat in relation to this case can be summarised as follows:

(a) It must be emphasised that not only registered or registerable interests in land can be a subject matter of a caveat. There may be other interest which may be capable of being D protected by a caveat. In *Registrar of Titles, Johore v. Temenggong Securities Ltd.* [1976] 1 LNS 135, Lord Diplock observed:

> The restriction under the Torrens system on the kinds of interests in land which are capable of being registered does E not prevent the creation of other kinds of interests in land or dealing with them. In particular it does not prevent or restrict the creation of beneficial interests in land whether under express trusts or under constructive or resulting trusts arising by operation of Malayan law, which in this F respect is derived from the rules of equity in force in England in 1956.

In *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18, Lord Diplock observed:

> G The system of private caveats is substituted for the equitable doctrine of notice in English land law. By section 322(2) the effect of entry of a caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. This is a very grave curtailment of the rights of H the proprietor, yet it can be imposed at the instance of anyone who makes a claim to title to the land, however baseless that claim may turn out to be. By section 324 the Registrar is required to act in an administrative capacity only; he is not concerned with the validity of the claim on I which the caveat purports to be based. If the document is in the correct form he must enter the caveat on the register

and leave the registered proprietor to secure its removal and to claim compensation from the caveator for any damage he has suffered by reason of the entry of the caveat having been obtained by the caveator without reasonable cause.

The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its corollary that caveats are available, in appropriate cases, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved. Nevertheless their Lordships would point out that the issue of a caveat differs from the grant of an interlocutory injunction in that it is issued *ex parte* by the Registrar acting in an administrative capacity without the intervention of the court and is wholly unsupported by any evidence at all. Unless there were some speedy procedure, open to the registered proprietor to get the caveat set aside in cases where the caveator's claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya, would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English law.

In *N. Vangedaselam v. Mahadevan & Anor* [1976] 1 LNS 80, Suffian LP observed:

It is important to remember that a caveat is not final and conclusive, that it is like an interim injunction and its purpose is only to preserve the *status quo* pending the taking of steps by the caveator to enforce his claim to an interest in the land by proceedings in the courts.

In *Macon Works & Trading Sdn. Bhd. v. Phang Hon Chin & Anor* [1975] 1 LNS 93, Hashim Yeop A. Sani J (as His Lordship then was) observed:

It has been well established that as far as our Land Code is concerned the whole system of caveats is founded on the principle that they exist for the protection of the alleged as well as proved interest and therefore not only is a person who has a right to a registrable interest in land who may

A enter a caveat but also any person claiming title to it or any registrable interest in any alienated land or even claiming only a right to such title or registrable interest may enter a caveat.

B In *Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka M.R.L. Murugappa Chettiar, Simati) v. Lee Teck Mook* [1995] 2 CLJ 545 the Court of Appeal considered whether there was a caveatable interest in an unconcluded contract. The court held that:

C (1) In order to sustain a caveat, a caveator must first pass through three stages: (i) whether he has disclosed a caveatable interest in his application under s. 323(1) of the Code; (ii) if he has established a caveatable interest, then, whether the evidence produced in support of his claim discloses a serious question to be tried; and (iii) if both D questions are resolved in the caveator's favour, then whether the balance of convenience or justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

E In *Lim Ah Moi v. AMS Periasamy Suppiah Pillay* [1997] 3 CLJ 629 the Court of Appeal outlined the principle for removal of caveat. The court stated:

(1) It is well settled that a caveat acts as a statutory injunction which fetters a registered proprietor from dealing with his F property and exercising all the rights conferred upon him by the Code. Because of its far-reaching effect, it is vital that claims made by a caveator are enforced by action without undue delay.

G (2) Whether a caveat ought to remain or be removed involves the exercise of discretion by the judge hearing an application under s. 327 of the Code. Particular attention should be paid to the words 'may make such order on the application as it may think just' that appear in the section. These words make it clear that a court hearing an application to remove a H caveat is very much concerned with the justice of the case. The process involves a balancing of competing considerations and an evaluation of the evidence and the facts of each particular case until the balance conclusively shifts in one direction or the other. On the facts, it was unconvincing that discretion was wrongly exercised by the judge in this case. I

[See *Paya Terubong Estates Sdn. Bhd. v. Pusaka Warisan Sdn. Bhd.* [1998] 2 CLJ 909; *Vijayalakshmi Devi Nadchatiram v. Danapakia Devi Nadchatiram & Anor* [1998] 2 CLJ 832 CA).

(b) The SLC requires the nature of the claim to be stated for every application for entry of a private caveat and needs the same to be verified. Failure to do so may be fatal and the court can order the caveat to be removed for non-compliance. (See *Wu Shu Chen (Sole Executrix of the Estate of Goh Keng How, Deceased) v. Raja Zainal Abidin Raja Hussin & Anor* [1996] 2 CLJ 353).

(c) Where the administration of the estate of a deceased is incomplete, the legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained and as such will not have a caveatable interest in the land. (*Tan Heng Poh v. Tan Boon Thong & Ors* [1992] 3 CLJ 1340; [1992] 1 CLJ (Rep) 316 (SC)).

(d) A trustee of a property held in trust as well as a beneficiary of any trust property is entitled to enter a caveat. However, a beneficiary who is only entitled to a share of the general residue has no right to enter a caveat against the property of the estate, when no part of the property of the estate has been expressly or impliedly devised and bequeathed under a trust created for his benefit. (*Khoo Teng Seong v. Khoo Teng Peng* [1990] 2 CLJ 233; [1990] 2 CLJ (Rep) 242).

(e) Beneficiaries of the estate of the deceased may enter caveat against the land of the deceased. (See *Hj Yahya Yusoff & Anor v. Hassan Othman & Anor* [1981] CLJ 127; [1981] CLJ (Rep) 152); *Lee Ah Thaw & Anor v. Lee Chun Tek* [1977] 1 LNS 52; *Jit Kaur v. Parl Singh* [1974] 1 LNS 57).

[9] On the facts of the case, I take the view that the plaintiffs' application must be allowed and my reasons are as follows:

(a) The property originally belonged to the father of the plaintiffs who died interstate. As a matter of law, all issues are entitled to a share of the father's estate. Thus, the claim by the plaintiffs is one recognised in law and falls within the provision of s. 173 of SLC. The plaintiffs claim is not for the residue in the estate.

A (b) The deceased's estate was administered by the plaintiffs' mother. As an administratrix she has no legal right to transfer the said property to only two of the children excluding the plaintiffs. *Prima facie* such transfer is invalid, null and void and will be against the Probate and Administration Act to be read
B with Distribution Act 1958 as amended in 1997.

(c) The 2nd defendant is only an administratrix and not a purchaser for value; neither was the late husband to obtain the benefit of the indefeasibility doctrine.

C (d) There appears to be *bona fide* merit in the plaintiffs' application; and the case cited by the 2nd defendant, relating to law of trusts, will not be applicable on the facts of this case, for the plaintiffs are the beneficiaries of the legal estate of the deceased. In this case, the surviving co-owner has filed
D an affidavit in support of the plaintiffs and this is a fact which distinguishes almost all cases which the 2nd defendant has cited.

[10] For reasons stated above, I allow the plaintiffs' application
E with costs. The costs are to be borne personally by the 2nd defendant. The getting up fees shall not exceed RM20,000. If costs cannot be agreed the plaintiffs are at liberty to tax their costs. I hereby order so.

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